SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1968

No. 1046

T. C. V'SOSKE, S. T. V'SOSKE, K. A. V'SOSKE, GEORGE A. SPATER and V'SOSKE SHOPS, INC.,
Respondents,

v.

E. T. BARWICK and E. T. BARWICK MILLS, INC.
Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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TO THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners seek a writ of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit. That Court, by a 2 to 1 vote, reversed a judgment of the District Court for the Southern District of New York entered after a trial without a jury and remanded on the issue of damages. The effect of the Court of Appeals judgment is to hold petitioners liable to the individual respondents for breach of an alleged contract with them to buy the assets and good will of the corporate respondent.

Note: The testimony was printed on the appeal to the Court of Appeals in a volume entitled "Joint Appendix," and the exhibits were reproduced in an "Exhibit Volume." The designations "J. A." and "E." refer to such volumes. The designation "A." is used to refer to the appendix to this petition. Numerical references are to page numbers.

Opinions Below

The majority opinion of the Court of Appeals appears in A 1. The dissenting opinion of Chief Judge Lumbard appears in A 11. The District Court's opinion appears in A 13. The opinions have not been reported.

Jurisdiction

The judgment of the Court of Appeals was entered on November 8, 1968 (A 24). The order of that Court denying a rehearing was entered on December 2, 1968 (A 18), and the order denying a rehearing en banc was entered December 30, 1968 (A 19).

This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

Questions Presented

(1) Did the Court of Appeals err in failing to apply Rule 52(a) of the Federal Rules in reviewing this breach of contract case which involved the issue whether or not the parties intended to be contractually bound to a $1,700,000 corporate acquisition and sale by an exchange of letters prior to the negotiation and execution of a formal contract?

(2) Did the Court of Appeals decide questions of New York law in conflict with state decisions when it

> (a) explicitly held that subsequent negotiations by both parties seeking new provisions did not vitiate the original contract (assuming there was such an original contract), and
>
> (b) implicitly held that there was a memorandum of the contract sufficient to satisfy the statute of frauds?

Rule and Statutes Involved

Rule 52(a) of the Federal Rules of Civil Procedure provides in pertinent part:

> *Findings by the Court*
>
> "(a) Effect. * * * Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

The Rules of Decision Act [28 U. S. C. § 1652] provides:

> *State laws as rules of decision*
>
> "The laws of the several states, except where the Constitution or treaties of the United States or acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

The pertinent provisions of the New York statute of frauds appear at A 20. They are former Sections 242 and 259 of the Real Property Law (now Section 5-703 of the General Obligations Law) and former Sections 31, 85 and 85-a of the Personal Property Law (now Section 5-701 of the General Obligations Law and Sections 1-206, 2-201 and 8-319 of the Uniform Commercial Code).

Statement

This action was initiated by respondents in the New York State Supreme Court (J. A. 4a). The individual respondents sought damages for breach by petitioners of an alleged contract with them to purchase the assets and good will of the corporate respondent (J. A. 4a-5a).

The individual respondents own the stock of the corporate respondent (J. A. 335a). Only the individuals sued

for breach of contract (J. A. 4a, 5a). Noncontract claims which are not here material were asserted by the corporate respondent (J. A. 5a-7a).

Petitioners removed the action to the United States District Court for the Southern District of New York on the ground of diversity of citizenship (J. A. 1a). Thereafter petitioners answered, denying the alleged contract and setting up defenses, including the statute of frauds (J. A. 9a, 10a).

The alleged contract was predicated upon correspondence between T. C. V'Soske, president of the corporate respondent, and E. T. Barwick, president of the corporate petitioner. The correspondence occurred in the fall of 1963 and related to the proposed purchase by petitioners of the rug business of the corporate respondent and its subsidiaries for about $1,700,000 (J. A. 14a-33a).

The correspondence followed meetings which Mr. Barwick had with Mr. V'Soske (J. A. 59a-61a). It was followed by the usual factual pattern found in corporate acquisition cases, including investigation of the business to be acquired, preparation of several drafts of a formal contract, consideration and discussion of tax consequences, and lengthy negotiations between the parties, their representatives, lawyers and accountants from late December, 1963 to early March, 1964, when the negotiations were terminated (J. A. 60a-66a, 170a-237a, 270a-269a). The provisions of a formal contract were concededly never agreed upon nor was such a contract ever executed.

The District Court found that the parties "never reached an agreement," that this was "almost a classic case of preliminary negotiations," that the evidence was "overwhelming that there were numerous loose ends never 'buttoned up'," and that, "for tax and numerous other reasons" the parties "plainly . . . contemplated a formal contract in writing" (A 13, 14). To that Court, it was "plain" from the beginning that these "sophisticated, mature and

experienced businessmen," in a transaction of this magnitude, "did not intend to be bound" until the signing of "a formal contract in writing spelling out their mutual rights and obligations exactly and precisely" (A 15-16). The District Court also held that, even "if we were to find that there was some kind of contract . . . it would be unenforceable under the Statute of Frauds" (A 16).

The Court of Appeals, by a 2-1 decision, reversed the District Court. The majority did not set aside any of the District Court's findings as "clearly erroneous." Rather it made an "independent review of the evidence" and drew an "inference" from some of the correspondence that the parties intended thereby to create a binding contract (A 22).

In a vigorous dissent Chief Judge Lumbard pointed out that the District Court had "found that the parties here engaged in nothing more than preliminary negotiations and that they did not intend to be bound until a written agreement had been executed", that such findings were "surely as much fact as law," and that it could not be said that they were "clearly erroneous," citing Rule 52(a) (A 12).

It is not necessary for present purposes to refer to the evidence in any detail. Enough appears from the opinion of the District Court and the majority and dissenting opinions of the Court of Appeals to establish our basic point. That point is that the determination of whether or not there was a contract involved issues of fact, and that the Court of Appeals was accordingly obligated to apply Rule 52(a) in reviewing those issues.

Reasons Relied on for Granting the Writ

1. In reviewing issues of fact, the Court of Appeals failed to apply Rule 52(a) of the Federal Rules. It thereby invaded the province of the District Court and exceeded the bounds of proper appellate review in conflict with decisions

of this Court and of Courts of Appeals, including decisions of different panels of the same Court which decided the instant case.

The most important question in this case as it came before the Court of Appeals was whether the parties intended to be bound by informal correspondence or whether they intended their obligations with respect to this $1,700,000 corporate acquisition to be fixed, if at all, only upon negotiation, preparation and execution of formal written documents.

This question was clearly an issue of fact to the resolution of which Rule 52(a) applied. *Banking & Trading Corporation* v. *Floete,* 257 F. 2d 765 (2nd Cir. 1958); *Glidden Co.* v. *Hellenic Mines, Ltd.,* 275 F. 2nd 253 (2nd Cir. 1960); *Smith* v. *Onyx Oil and Chemical Co.,* 218 F. 2nd 104 (3rd Cir. 1955).

The approach which the Court of Appeals should have taken in deciding the case is illustrated by what a different panel of that Court said in the *Banking & Trading Corporation* case, *supra,* at 769:

> "* * * Here the crucial question is whether the parties intended not to be bound, or whether either of them manifested an intent to the other not to be bound, until a fully integrated contract had been executed. [citations omitted.] To be sure, the fact that the parties contemplated that an integrated memorial of their agreement would be executed is not conclusive of their intent not to be bound until after execution, Restatement of Contracts, § 26, but it does constitute some evidence thereof. Thus, ultimately the decision here depends upon an issue of fact. In Disken and Onyx the trier of fact found that the parties had intended to be bound prior to the execution of a formal writing. In the present case, however, the district judge found otherwise—that the parties intended not to be bound until RDC's form 22 had been executed by RDC. That finding is conclusive upon this appeal unless we find it to be

> 'clearly erroneous.' After examining the record we believe that here the district court's finding was certainly not 'clearly erroneous,' but rather that it was indeed in accord with the weight of the evidence."

In the instant case the District Court found that the evidence was "abundantly clear," "overwhelming," and "plain" that the parties did not intend to be bound until there was a formal contract signed (A 14). Instead of giving great weight to the trial judge's evaluation of the testimony and his inferences from documents and due regard to the trial judge's opportunity to judge the credibility of witnesses—as it would have had to do had it applied Rule 52(a)—the Court of Appeals treated the case as if it were conducting a trial *de novo*.

Freed—as it evidently assumed itself to be—from the strictures of Rule 52(a), the Court of Appeals conducted an "independent review of the evidence" (A 22) and made its decision largely upon the basis of what two of its judges deemed to be "the reasonable inference" from the language of three letters and what credit they saw fit to give the testimony of certain witnesses on the issue of intent.

It should be emphasized that this is not simply a case of an application of Rule 52(a) in an erroneous way. It is a case of total failure to apply the rule. Thus, the Court of Appeals did not declare that the "inference" it drew from the three letters or the findings it made from the testimony were compelling or that any other result was rationally impossible or "clearly erroneous" (A 22). It obviously believed that Rule 52(a) had no application and that it was, therefore, at liberty to indulge its own inference and make its own findings as if it were sitting at *nisi prius*, without regard to the diametrically opposite inference and findings of the trial court.

The trial court found that the correspondence was "saturated with the thought that more remains to be done be-

fore a definite contract is to be entered into" (A 15). The Court of Appeals not only assumed the power to draw a different inference from that of the trial court from the correspondence, when the trial court's inference was, to say the least, just as reasonable and, by any standard, was not "clearly erroneous." The Court even undertook to decide contrary to the trial court on matters of credibility.

We need cite only one example on the issue of credibility which directly involved the central question of the intent of the parties in order to demonstrate how destructive a decision of this sort is to the fundamental premise of the Federal Rules that trial courts, not appellate courts, are the arbiters of fact and credibility.

One of petitioners' counsel testified to a meeting with respondents' counsel in March, 1964, which was more than three months after the time the Court of Appeals found the parties had made a contract by three letters written in November and December, 1963. At this meeting, according to petitioners' counsel, respondents' counsel said "that he had consulted with his tax department, and that they were of the opinion that they could not afford to have any contract before the corporations were liquidated"* and that "he wanted it understood by everybody concerned that they did not have any legally binding contract at that time" (J. A. 227a). Petitioners' counsel also testified that, at that meeting, he "definitely" agreed with respondents' counsel that "there was no binding agreement" and that he "was prepared to so testify if it ever became material in any tax controversy" (J. A. 238a). A senior vice president of the corporate respondent fully corroborated the testimony of petitioners' counsel (J. A. 265a). Respondents' counsel, on the other hand, denied making any such statements (J. A. 295a-296a).

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* See *Godrecu* v. *Treasurer of Puerto Rico*, 77 P. R. R. 531 (1954) citing *Comm.* v. *Court Holding Co.*, 324 U. S. 331 (1944) and *U. S.* v. *Cumberland Pub. Serv. Co.*, 338 U. S. 451 (1949).

Here, then, was a direct conflict in testimony bearing on the key issue whether the parties had intended their letters and other negotiations in 1963 to constitute a contract. If petitioners' counsel and its senior vice president were telling the truth, there was no contract in existence even as late as March, 1964. The District Court found they did tell the truth. It held the "parties did not intend to be bound until a written agreement had been signed and delivered" because of "tax and numerous other reasons" and that "the testimony on that subject* points once again to the fact that there were still unsettled terms and to the fact that the parties did not intend to be bound until execution and delivery of a formal contract" (A 15, 17).

Nonetheless, despite this District Court finding, based on conflicting evidence, that the parties did not intend to be bound except by a formal contract, the Court of Appeals—by the device of ignoring Rule 52(a) altogether and making its own "independent review of the evidence"—concluded that the parties made a contract through informal correspondence.

It is clear from decisions of this Court that the Court of Appeals had no right to ignore Rule 52(a) and make its own "independent review of the evidence" in a case involving issues as to the intent of the parties, the credibility of witnesses, and the inferences to be drawn from documents.

Although *United States* v. *Yellow Cab Co.*, 338 U. S. 338 (1949) was not a contract case, it did involve issues of intent, and this Court there held that Rule 52(a) applies to

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* As appears from its opinion, the District Court's reference to "that subject" was to petitioners' defense of rescission. Petitioners claimed that the testimony as to the March, 1964 meeting of counsel showed that, even if there had once been a contract, it was rescinded (J. A. 325a-327a). The District Court believed the testimony of petitioners' counsel as to what was said at the March meeting but treated it as simply further evidence that there never was a contract.

"findings as to the design, motive and intent with which men act" (341). It observed that such findings "depend peculiarly upon the credit given to witnesses by those who see and hear them," and commented that, "If defendants' witnesses spoke the truth, the findings are admittedly justified" (341).

In *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 394, 396 (1947), this Court held that, insofar as findings are "inferences drawn from documents," Rule 52(a) applies. In *Graver Tank Co.* v. *Linde Air Prod. Co.*, 339 U. S. 605, 611 (1950), speaking of the duty of an appellate court, under Rule 52(a), to defer to the trial court on issues of fact, this Court said:

> "It is not for this Court to even essay an independent evaluation of the evidence. This is the function of the trial court."

Rule 52(a) is not a mere guide to be applied by Courts of Appeal to cases where it finds it convenient to do so and not to those where it may dislike the result which the rule compels. If issues of fact are involved, Rule 52(a) is a "mandate" which must be applied on appeals to the Court of Appeals just as it must on appeals to this Court. *United States* v. *National Ass'n of Real Estate Bds.*, 339 U. S. 485, 495-496 (1950).

Nor does the rule allow appellate judges to make their own choice "between two permissible views of the weight of evidence" or permit them to reverse merely because they might "give the facts another construction" or "resolve the ambiguities differently." *United States* v. *National Ass'n of Real Estate Bds.*, *supra* at 495. A finding is only "clearly erroneous" when "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States* v. *United States Gypsum Co.*, *supra* at 395. If the Court of Appeals had applied that test here, it could not rationally have reversed.

Whether, and to what extent, Rule 52(a) applies to contract cases is an important question of federal law. Contract cases generally involve issues of fact and mixed issues of fact and law as well as pure questions of law. Especially is this true of cases involving corporate acquisitions. Indeed, the factual pattern in the instant case of investigation, negotiations, correspondence, tax consciousness, drafts of contracts, and the like is typical of that in most corporate acquisitions. Nor is the foundering of the deal at the formal contract stage unusual.

If the decision below is permitted to stand, appeals in cases involving a broad area of commercial law have been exempted from Rule 52(a), and this exemption has been promulgated in the judicial circuit which handles more important commercial litigation than any other.

2. The Court of Appeals decided an important question of New York law in conflict with state decisions when it held that subsequent negotiations by both parties on new provisions "do not defeat the original agreement of the parties" (A 10). Assuming, *arguendo,* that there was an "original agreement" by virtue of the November and December letters, New York law is clear that subsequent negotiations by both parties on new provisions vitiated that agreement.

The holding of the Court of Appeals is in direct conflict with *Boysen* v. *Van Dorn Iron Works Co.,* 94 App. Div. 95 (4th Dep't N. Y. 1904) and *Industrial Engineering Co.* v. *Jennison-Wright Co.,* 203 App. Div. 711 (1st Dep't N. Y. 1922). Those cases hold that, even if a "proposition and acceptance considered independently were adequate on their face to form a valid agreement in that they indicated that the parties had intended a definite final understanding," such proposition and acceptance are not binding until the signing of the formal written agreement where "the subsequent conduct of the parties . . . indicates that they

did not regard the proposition and acceptance as a binding memorandum" (94 App. Div. at 98, 96). The rule is well summarized in Encyclopedia, New York Law, Vol. 6, Contracts, § 212, pp. 54-55:

> "* * * Thus if, even though at one point in the correspondence a definite offer has been unequivocally accepted, if the parties thereafter continue their negotiations, each trying to get better and more definite terms of performance, it is evident that they regarded the initial offer and acceptance as no more than preliminary negotiations leading up to their final assent."

The cases cited by the Court of Appeals do not deal with subsequent attempts by both parties to obtain new and improved provisions and are hence clearly distinguishable. In those cases, *John W. Rouse Construction Company* v. *Albany Acoustical Corp.*, 9 A. D. 2d 38 (3rd Dep't N. Y. 1959) and *Sanders* v. *Pottlitzer Bros. Fruit Co.*, 144 N. Y. 209 (1894), only the party disclaiming the existence of the contract sought to add such provisions. In the instant case both parties contemplated additional terms, negotiated for improved provisions, and modified the original understanding.*

The *Boysen* case, *supra,* distinguished the *Sanders* case, *supra,* on this very ground. The Appellate Division in *Boysen* stated (94 App Div. at 99):

> "* * * Had the negotiations of the present parties ceased with the proposal and acceptance the case cited would be controlling. The distinction is that both parties in this action sought to modify materially the original understanding, and each in effect recognized the right to make alterations in its terms before it became a consummated agreement."

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* Chief Judge Lumbard's dissent enumerates the many material provisions about which both parties negotiated in the months subsequent to the letters in November and December, 1963 which the majority held constituted the contract (A 11).

3. The Court of Appeals decided an important question of New York law in conflict with state decisions when it implicitly held that there was a memorandum of the contract sufficient to satisfy the statute of frauds.

The District Court unequivocally held that there was "certainly no memorandum to satisfy the Statute of Frauds" (A 16). While the Court of Appeals opinion does not explicitly deal with this question, the matter was argued before the Court both on the original appeal and on the rehearing, and its judgment necessarily constitutes a ruling adverse to petitioners on the issue.*

The Court of Appeals found the contract to consist of three letters. The first was a letter of October 10, 1963 signed by Mr. Barwick on corporate stationery and addressed to Mr. V'Soske, V'Soske Shops, Inc., which the Court of Appeals described as "an actual offer for the purchase of V'Soske Shops" (Pl.'s Ex. 2, E. 5; A 7). The second was a letter of November 29, 1963 signed V'Soske Shops, Inc. and addressed to Mr. Barwick at Barwick Mills, Inc. by T. C. V'Soske, President, which the Court "interpreted as a counter offer" (Pl.'s Ex. 3, E.8; A 7). The third was a letter of December 6, 1963 signed by Mr. Barwick on corporate stationery and addressed to Mr. V'Soske, V'Soske Shops, Incorporated, which the Court found was an acceptance (Pl.'s Ex. 15, E. 17; A 7).

We believe these letters omit a number of the essential terms necessary to a complete memorandum. However, we here note only the most blatant omission. Nowhere in the letters are the individual respondents identified as the sellers of the business, yet it is the individual respondents who sue as sellers for breach of contract (J. A. 4a,

* The oblique references in the Court of Appeals opinion to the "essential terms" of the contract being adequately expressed may perhaps have been intended as the Court's answer to the statute of frauds point.

5a). Assuming *arguendo* that the letters might be a sufficient memorandum of a contract by the corporate respondent to sell its business, the corporate respondent is not suing, and has never sued, on any such contract.

It is a "settled rule of law" in New York that the memorandum to satisfy the statute of frauds, although it need normally be signed only by the party to be charged, "must identify by name or description the parties to the transaction, a seller and a buyer" (*Irvmor Corp.* v. *Rodewald,* 253 N. Y. 472, 475 (1930)). See also, *Mentz* v. *Newwitter,* 122 N. Y. 491 (1890) and *Lerand Corporation* v. *Meltzer,* 267 N. Y. 343 (1935). The Court of Appeals in the instant case disregarded these controlling decisions when it held that the letters constituted a sufficient memorandum.

4. To maintain the vitality of Rule 52(a), and promote uniformity of decision between federal and state courts on important issues of New York commercial law, this Court should exercise its discretion and grant the writ of certiorari prayed for.

WHEREFORE, upon the foregoing grounds, it is respectfully urged that this writ of certiorari be granted and that the judgment of the Court of Appeals be reversed.

Dated: New York, New York
February 13, 1969

Respectfully submitted,

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APPENDIX

Opinions of the United States Court of Appeals for the Second Circuit

Before LUMBARD, Chief Judge; KAUFMAN and HAYS, Circuit Judges.

Opinion per Kaufman, Circuit Judge

KAUFMAN, *Circuit Judge:*

The question for our determination is whether the parties by their correspondence made a binding offer and acceptance to buy and sell a business, so that even in the absence of a formal contract they created a legally enforceable agreement.

Appellants, V'Soske Shops, Inc., and its individual stockholders T. C. V'Soske, S. T. V'Soske, K. A. V'Soske, and George Spater, on June 22, 1964, brought this action against E. T. Barwick Mills, Inc., and its president and majority stockholder E. T. Barwick in the New York State Supreme Court for New York County seeking damages for breach by Barwick of an alleged contract in which he had agreed to purchase the assets and good will of V'Soske Shops, Inc., for a sum equal to its audited net worth plus $700,000.[1] Upon petition of the appellees, the action was removed to the United States District Court for the Southern District of New York because of diversity of

[1] Appellants also sought damages on behalf of the corporation for the alleged violation by Barwick of an agreement to keep the existence of the alleged contract confidential and for an injunction restraining Barwick from using alleged trade secrets. However, the District Court granted appellees' motion to dismiss these claims, and appellants have not appealed that ruling.

citizenship.[2] A trial before Judge MacMahon without a jury resulted in the judgment dismissing the action on the merits which is the subject of this appeal.

I.

V'Soske Shops is a small Puerto Rican corporation engaged in the manufacture of high quality custom-made rugs. Thad V'Soske manages the business, and his brother S. T. V'Soske is its principal designer. Barwick Mills, a Georgia corporation, is a large manufacturer of tufted carpets; prior to 1964 it did not manufacture custom-made rugs.

In the spring of 1963, Mr. E. T. Barwick [hereafter referred to as Barwick] became interested in entering the custom-made rug market by acquiring the business of V'Soske Shops. Preliminary negotiations were conducted at an initial meeting between Barwick and the V'Soskes in June of 1963 in Puerto Rico, where Barwick inspected their plant, and in New York the following August, where Barwick met with Spater, a V'Soske stockholder and attorney. At a second meeting in Puerto Rico in early September, discussions turned to the subject of price: the V'Soskes stated that they wanted $4,000,000 for their business, and Barwick responded with a suggestion of $1,500,000. The meeting concluded with Thad V'Soske's statement that they were open to further negotiation, and Barwick's answer that he would think it over.

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[2] V'Soske Shops, Inc. is a Puerto Rican corporation, and all the individual appellants are residents of Puerto Rico, with the exception of George A. Spater, who is a resident of New York; E. T. Barwick Mills, Inc. is incorporated in Georgia and has its principal place of business there, and E. T. Barwick is a resident of Georgia.

After Barwick's return, a series of letters were exchanged which appellants claim gave rise to a binding contract for the sale of the V'Soske business. On September 9, 1963, Barwick wrote Thad V'Soske, saying:

> ". . . I am prepared to offer you $1,600,000 for the V'Soske Shops, Inc., subject of course to independent audits concerning the $1,000,000 net worth of the manufacturing entity.
>
> "I should like to suggest that if the transaction is acceptable to you, the initial payment of $1,000,000 for the company and the remaining $600,000 over the next four years in equal payments.
>
> "All phases of operations and management would be along the lines of our conversation.
>
> "After you have had time to consider this proposal, I shall be very glad to hear from you."

After receiving V'Soske's return letter, in which he sought to explain why the past profit of V'Soske Shops had been low, and why higher profits were to be expected in the future, Barwick responded with a letter, dated October 10, setting forth at great length the reasons which he believed justified his last offer, and concluding:

> "I am willing, at this time, to increase my offer for a cash settlement for the audited book value of your company plus $700,000 to be paid in five equal annual installments of $140,000 each, with management contracts or arrangements as we discussed on our two visits.
>
> "I think this is as far as I am willing to go, and I should like to know within thirty days whether or not this offer will be accepted because I do not feel I can wait much longer before entering into this type of manufacture, perhaps in closer proximity to my plants in North Georgia."

Majority Opinion

On October 28, V'Soske wrote Barwick asking that he extend his offer for another thirty days, to which Barwick acceded, stating: "Please let me know as soon as possible your decision." Then on November 29, V'Soske responded:

> "We have reviewed your offer carefully and have come to the conclusion that we are willing to sell our business at the price you propose—its audited net worth plus $700,000—on the following terms:
>
> 1. $1,200,000 down, payable within 30 days after an agreement is reached; the balance to be paid in equal monthly installments over a period of four years.
>
> 2. Employment contracts will be signed with our five top management people for five years at present rates of compensation (aggregating $74,500.00 annually) for jobs having responsibility equal to their present jobs and at their present location in Puerto Rico, as per verbal agreement.
>
> 3. Any brokerage or finder's fees, . . . to be paid by you.
>
> 4. The scope of the audit to be as outlined below."

There followed a lengthy discussion of the proposed audit, specifying, *inter alia*, that inventories and fixed assets would be valued at cost, that the rates of depreciation on fixed assets would be as therein specified, that a $93,000 advance made by V'Soske to its Irish affiliate would be valued at face amount, and that the audit would be made by "a nationally recognized firm of certified public accountants comparable to Haskins & Sells [the firm which regularly audited the V'Soske books]." Throughout this letter, V'Soske emphasized that he wished these methods of valuation to be clearly understood at the outset in order that later disputes be avoided. Then on December 2, Barwick wrote back saying:

> "I agree in principle with your outline of evaluation and I see no obstacle in our agreeing inasmuch as I have a high regard for Haskins & Sells. . . . Our overall public accountant is Arthur Anderson whom I am sure you have respect for also and I am sure Arthur Anderson and Haskins & Sells will have no difficulty in reconciling the account."

The letter went on to ask that V'Soske clarify certain points discussed in his last letter. After receiving the requested information, Barwick wrote on December 6:

> "As stated in my recent letter I am in accord with your outline for purchase.
>
> "I should like, if it is convenient for you, to visit you on the 19th and 20th of December with Mr. Mel E. Kellar, our Vice President and Treasurer to begin procedures for consummating the purchase."

The parties then began "procedures for consummating the purchase." On December 19 and 20, Barwick, accompanied by three of his staff, again visited the V'Soskes in Puerto Rico. During this visit the Barwick group discussed with the partner in charge of the Haskins & Sells office in Puerto Rico the procedure for the 1963 audit, toured the V'Soske plant again, and agreed that the independent audit to determine audited net worth would commence immediately after the end of the year. The audit was begun on January 7, 1964, when Haskins & Sells, together with Arthur Anderson and Barwick's own experts, started the physical inventory of V'Soske Shops; that phase of the audit was subsequently completed to the satisfaction of all the parties.

On January 18, another series of meetings was held between the parties and their representatives in Puerto Rico. During these meetings, a number of points were raised, some of which were resolved without difficulty. Several

illustrations of these items follow. Barwick advised V'Soske that for tax and other reasons he wished to effect the acquisition by a purchase of assets rather than stock. After some deliberation, V'Soske agreed, and it was mutually decided the V'Soskes would run their business for Barwick's account as of January 1, 1964, and that all transactions not in the ordinary course of business would thereafter be cleared with Barwick. Also, matters including warranties and security on the deferred purchase price were discussed and apparently settled. Other questions raised at this time, however, became the subject of protracted controversy. Barwick suggested that the contemplated employment contracts should contain a cancellation clause entitling him to cancel these agreements at any time upon the payment of one-half the balance due for the five-year term; and on his side, V'Soske proposed that he be given a $30,000 per year expense account similar to the one he had enjoyed in the past. After long negotiations, both of these terms were finally agreed upon several days before Barwick's repudiation in March. Another problem centered on Barwick's insistence that V'Soske Shops modify its exclusive sales contract with Lord & Adams so as to permit the sale of V'Soske products through Barwick's selling organizations. This matter, first raised at the January meetings, was never resolved. And further, Barwick's accountants raised certain objections to Haskins & Sells accounting procedures which also seem never to have been resolved.

Finally, during February, a draft of the formal written contract was circulated, and the parties met again in early March to discuss the remaining problems and to revise this draft. But, upon his return from Puerto Rico, Barwick sent V'Soske a letter on March 9 stating:

> "... I have reviewed the situation and have come to the conclusion that we should terminate negotiations looking toward the purchase of your business."

II.

The trial court found that the correspondence between the parties presented "almost a classic case of preliminary negotiations which never ripened into a contract," and accordingly awarded judgment to appellees. For the reasons below, we reverse.[3]

Looking first to the correspondence itself, we believe that Barwick's letter of October 10, 1963, was not merely an incident in "preliminary negotiations," but an actual offer for the purchase of V'Soske Shops. Not only did Barwick himself characterize it as an offer, but he specified the time limit within which it was to be operative, and later agreed to an extension in response to V'Soske's request. When viewed in light of the American Law Institute's Restatement definition of an offer as "the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it," Restatement (Second) of Contracts § 24 (Tent. Draft No. 1, 1964), Barwick's letter can hardly be construed otherwise than as extending to V'Soske the power of acceptance. Regarded in this context, V'Soske's letter of November 29, since it made a substantial change in the terms of payment and added other significant terms, must be interpreted as a counter offer, which Barwick accepted by his letter of December 6 after receiving the clarifications he had requested.

Appellees argue that even if the language of the correspondence may be so interpreted, there was no intent to be bound until the signing of a formal document, and hence no obligations were fixed. Two rules on this subject are well established: first, if the parties intend not to be

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[3] Since the parties stipulated below that New York law should govern, we shall consider New York as the source of the applicable law.

bound until they have executed a formal document embodying their agreement, they will not be bound until then; and second, the mere fact that the parties contemplate memorializing their agreement in a formal document does not prevent their informal agreement from taking effect prior to that event. *Smith* v. *Onyx Oil and Chemical Co.*, 218 F. 2d 104 (3d Cir. 1955); *Zirman* v. *Beck*, 225 N. Y. S. 2d 330 (1962); *Karson* v. *Arnow*, 224 N. Y. S. 2d 891 (1962); *Sanders* v. *Pottlitzer Bros. Fruit Co.*, 144 N. Y. 209, 39 N. E 75 (1894); Restatement (Second) of Contracts § 26 (Tent. Draft No. 1, 1964); 1 Corbin on Contracts § 30 (1950); 1 Williston on Contracts § 28 (3d ed. 1957). Contract law has progressed and evolved sounder principles since the days of ritualistic and formalistic sealed instrument requirements. Thus, these rules, placing the emphasis on intention rather than form, are sensible and reasonable.

To overcome the reasonable inference we draw from the language of the correspondence that the parties did indeed intend thereby to create a binding contract, appellees must do more than merely point to the circumstance that a formal document was contemplated: they must show either that both parties understood that their correspondence was to be of no legal effect or that V'Soske had reason to know that Barwick contemplated that no obligations should arise until a formal contract was executed. But appellees have referred to no evidence substantiating either of these possibilities, and we do not find them supported by our independent review of the evidence. Moreover, the subsequent agreement of the parties that the V'Soske business would be run for the Barwick company's account starting January 1, 1964, and that all transactions after that date not occurring in the ordinary course of business would be subject to Barwick's approval strongly indicates that the parties thought they had a binding

agreement at that time. Accordingly, we find that by their correspondence the parties did intend to create a contract for the sale of V'Soske Shops.

Appellees strongly urge that even if we find contractual intent, nevertheless a binding contract never came into being because too many important terms were left unsettled by the exchange of letters. In support of this contention they point to the subsequent difficulties the parties encountered in reaching agreement on certain terms. The law is clear that although the parties may intend to enter into contract, if essential terms are omitted from their agreement, or if some of the terms included are too indefinite, no legally enforceable contract will result. *Kusky* v. *Berger*, 225 N. Y. S. 2d 797 (1962), aff'd, 249 N. Y. S. 2d 858 (1964); *Willmott* v. *Giarraputo*, 5 N. Y. 2d 250, 157 N. E. 2d 282 (1959); *Warrin* v. *Charm Fashions, Inc.*, 82 N. Y. S. 2d 476 (1948), aff'd 89 N Y. S. 2d 704 (1949). But it is also plain that all the terms contemplated by the agreement need not be fixed with complete and perfect certainty for a contract to have legal efficacy. *Park Inn Hotel, Inc.* v. *Messing*, 224 N. Y. S. 2d 179 (1962); *Biothermal Process Corp.* v. *Cohu & Co.*, 119 N. Y. S. 2d 158 (1953), aff'd 308 N. Y. 689, 124 N. E. 2d 323 (1954); *Castelli* v. *Tolibia*, 83 N. Y. S. 2d 554 (1948), aff'd 96 N. Y. S. 2d 488 (1950); *May Metropolitan Corp.* v. *May Oil Burner Corp.*, 290 N. Y. 260, 49 N. E. 2d 13 (1943). In this case, almost all of the later points of contention, such as the provisions of the employment contract and the modification of the V'Soske agreement with Lord & Adams arose because the parties sought to amend their agreement to include new terms. Such negotiations on new provisions do not defeat the original agreement of the parties. See *John W. Rouse Construction Corp.* v. *Albany Acoustical Corp.*, 189 N. Y. S. 2d 532 (1959); *Sanders* v. *Pottlitzer Bros. Fruit Co.*, *supra*. The only term in their original contract upon which the

parties later faltered was "audited net worth." But that these parties failed to agree as to the valuation of audited net worth does not convince us that the term is intrinsically so difficult to ascertain as to defeat the contract. On the contrary, the term has a well defined meaning and provides a method of valuation by which the exact amount contemplated can be determined. *Castelli* v. *Tolibia, supra.* And indeed, courts have upheld contracts where essential terms were far less definite. See, e.g., *Biothermal Process Corp.* v. *Cohu & Co., supra; May Metropolitan Corp.* v. *May Oil Burner Corp., supra.* Moreover, all the other terms essential to the agreement were specified in V'Soske's counter offer of November 29. We therefore hold that by their correspondence, the parties entered into a valid contract, which Barwick breached by his letter of March 9, 1964.

Since the trial court has not had an opportunity to consider the issue of damages, we remand for that purpose.

Reversed and remanded.

Dissenting opinion per Lumbard, Chief Judge

LUMBARD, *Chief Judge* (dissenting):

I dissent. Judge MacMahon found that the parties here engaged in nothing more than preliminary negotiations and that they did not intend to be bound until a written agreement had been executed. I do not see how, on this record, we can say that these findings—which are surely as much fact as law—were clearly erroneous. Rule 52(a), Fed. R. Civ. Procedure. On the contrary, I feel that the record amply supports Judge MacMahon's findings and that the judgment should therefore be affirmed.

Subsequent to December 6, 1963, the date on which the majority say there was a binding agreement, two written contracts were drafted and there were numerous meetings and discussions between the parties and their attorneys regarding the provisions of these contracts. The record shows that several matters of importance had not been resolved as of December 6, many of which were never in fact resolved. These include:

1. Accounting treatment and valuation of certain items in calculating audited net worth.

2. Various tax matters, such as whether the purchase should be a stock or asset acquisition.

3. Treatment of the Lord & Adams exclusive sales contract with V'Soske which involves about one-third of the United States market.

4. The terms of the employment contracts of the five principal executives, and particularly the $30,000 expense account of Thad V'Soske.

5. Whether a mortgage should be given on the V'Soske property to secure the deferred balance in the purchase price.

In my opinion these are precisely the kinds of matters which any prudent purchaser would wish to have resolved before finally committing himself to paying over $1,700,000 for a going business and incurring continuing obligations to the very persons who had sold the business and who were expected to continue in its management for as long as five years. In these circumstances it is only logical that the parties did not intend to be bound before the execution of a detailed formal contract, and that they would not, under New York law, be so bound. See *Schwartz* v. *Greenberg*, 304 N. Y. 250 (1952); *Willmott* v. *Giarraputo*, 5 N. Y. 2d 250 (1959); *Kusky* v. *Berger*, 225 N. Y. S. 2d 797 (1962), aff'd, 249 N. Y S. 2d 858 (1964).

I would affirm the judgment of the district court.

District Judge MacMahon's Opinion

[501] The Court: The Court has very carefully read the trial briefs submitted by both counsel, the proposed findings of fact submitted by both counsel, all the exhibits that have been received in evidence and observed and heard the testimony of all of the witnesses.

By agreement of counsel, there are two issues of fact for this Court's decision, and only two, and that is, one, whether the parties reached an agreement in writing or otherwise for the purchase and sale of the business of V'Soske and its subsidiaries; and issue two, whether prior to the termination of the negotiations the parties mutually agreed that no purchase and sale agreement existed or could exist for tax reasons until after the dissolution of V'Soske and its subsidiaries.

Turning to the first of these issues, it is abundantly clear to the Court that the parties in their correspondence never reached an agreement. It presents almost a classic case of preliminary negotiations which never ripened into a Contract.

There is no point in that correspondence, and the Court has read the correspondence at least three times in toto, where one can say that these [502] parties manifested a mutual assent to all the terms of a completed agreement.

In addition to the correspondence, the other documentary evidence and the testimony of the witnesses is overwhelming that there were numerous loose ends never "buttoned up" but left wide open for future negotiation.

I need but point to the employment contracts as one example. The Lord & Adams' situation is another instance of the loopholes that were inherent in the express under-

standing that formation of a final contract was from the outset subject to the results of an independent audit of V'Soske by defendant's accountants.

The correspondence on both sides is saturated with the thought that more remains to be done before a definite contract is to be entered into. Thus, the correspondence refers to an outline of a transaction and to a basis for future and, at most, presents a classic example of an agreement to agree which, of course is no agreement at all. ***Ansorge*** v. ***Kane***, 244 N.Y. 395 (1927); *St. Regis Paper Co.* v. *Hubbs & Hastings Paper Co.*, 235 N.Y. 30 (1923).

That other terms to the potential bargain were contemplated is also plain from the parties' conduct. Each of the principals dealt through numerous [503] other people and delegated to them the authority and task of negotiating and formulating the final terms of a written contract. It was left to them to iron out and straighten out the disputes and to negotiate many important details. For example: What items would be included in the assets? What value would be given to them? What was the book value of this company? What was its net worth? What items were properly to be included in the assets and liabilities? What warranties were to be given? What were the terms of the employment contracts? All of this and other equally significant matters were left wide open from the beginning, and the parties never did reach an agreement about a great deal of it.

There are other matters that were left open. These men were not babes in the woods, but sophisticated, mature and experienced businessmen. The transaction involved over a million and a half dollars. It was plain from the beginning that the parties did not intend to be bound until a written agreement had been signed and delivered. This was true for tax and numerous other reasons. Plainly, they contemplated a formal contract in writing spelling out their mutual

rights and obligations exactly and precisely. That this [504] was so is clearly evidenced by two drafts of formal contracts and several conferences among the parties, attorneys and accountants in an attempt to reach agreement on open items and embody the bargain in a formal contract.

These facts plainly show an intention not to be bound by any mere oral or informal understanding. In such circumstances, there is no contract until execution and delivery of the written agreement. *Schwartz* v. *Greenberg,* 304 N.Y. 250 (1952). Plainly there were details yet unsettled, there were many matters still open for the formal written contract, and, as the evidence shows, the bargain was incomplete and, at best, conditional. See *Trustees of First Presbyterian Church in Newark* v. *Howard Co. Jewelers,* 12 N.J. 410, 97 A.2d 144 (1953).

I think on any objective appraisal of this evidence you can come to no other conclusion. It is supported not only by the testimony and all the surrounding circumstances, but also by the very fact that there were two written drafts of complete agreement with the working out of all of the terms, the usual types of terms that go into an acquisition of this magnitude.

[505] I think it plain, without going into any greater detail here, since I do not deem it my function here to catalog all of the evidence, but rather to decide the ultimate issues of fact, that this was nothing but an instance of preliminary negotiations that never ripened into a completed contract of any kind, oral or written.

Moreover, if we were to find that there were some kind of contract, I think that it would be unenforceable under the Statute of Frauds for the very reasons that there is no contract, there is also no memorandum.

Opinion by MacMahon, D.J.

I think there are numerous cases holding that a memorandum is insufficient unless it contains all the terms of a completed contract. Since we have no writing signed by anybody in charge, or no combination of writings which would spell out all the terms of a completed contract, there is no contract at all and certainly no memorandum to satisfy the Statute of Frauds. *Textile Capitol Bldg. Corp.* v. *Wendel Foundation,* 253 App. Div. 332, 338, affirmed 279 N.Y. 769 (1938); *Keystone Hardware Corp.* v. *Tague,* 246 N.Y. 79, 84 (1927); *Pollack* v. *Dapper,* 245 N.Y. 628 (1927); *Ansorge* v. *Kane,* 244 N.Y. 395, 398 (1927); *Poel* v. *Brunswick-Balke Collender Co.,* [506] 216 N. Y. 310, 314 (1915).

Even if we assume that there was a contract, I do not think there was a rescission. Rather, I think the testimony on that subject points once again to the fact that there were still unsettled terms and to the fact that the parties did not intend to be bound until execution and delivery of a formal contract. The parties were still at the negotiating stage, and the transaction had not ripened into any formal, informal, oral, or any other kind of contract. It just never reached that point where there was a meeting of the minds or, more modernly, a manifested mutual assent.

Finally, there has been some suggestion by plaintiffs that defendants broke off negotiations in bad faith. We find to the contrary that plaintiffs' misrepresentations and ever-growing demands were sufficient to shatter the confidence of the defendants in entering into a contract which involved not only an enormous purchase price but additional investment of many millions and a continuing and confidential relationship with the two V'Soske brothers.

The foregong constitutes the court's findings of fact. Having made these findings, I do not reach the question of damages.

[507] The court makes the following conclusions of law: that the court has jurisdiction over the action by reason of the diversity of citizenship of the parties; that the first alleged claim in the complaint, as amended, must be dismissed; and, as I earlier held, that the second and third claims must, as amended, also be dismissed.

Submit a judgment in accordance with these findings and conclusions within ten days.

Good night, gentlemen.

Order of Court of Appeals Denying a Rehearing dated December 2, 1968

32484-87

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

T. C. V'SOSKE, S. T. V'SOSKE, K. A. V'SOSKE, GEORGE A. SPATER AND V'SOSKE SHOPS, INC.,
Plaintiffs-Appellants,

v.

E. T. BARWICK AND E. T. BARWICK MILLS, INC.,
Defendants-Appellees,

(and 3 other cases).

A petition for a rehearing having been filed herein by counsel for the appellees,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is Denied.

Dated: December 2, 1968

Irving R. Kaufman

.....

IRVING R. KAUFMAN

Paul R. Hays

.....

PAUL R. HAYS

I Dissent and Vote to Grant.

J. Edward Lumbard

.....

J. EDWARD LUMBARD

Order of Court of Appeals Denying a Rehearing en banc dated December 30, 1968

32484-87

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

T. C. V'SOSKE, S. T. V'SOSKE, K. A. V'SOSKE, GEORGE A. SPATER AND V'SOSKE SHOPS, INC.,

Plaintiffs-Appellants,

v.

E. T. BARWICK AND E. T. BARWICK MILLS, INC.,

Defendants-Appellees,

(and 3 other cases).

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellees and no active circuit judge having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

J. Edward Lumbard

.....

J. EDWARD LUMBARD, Chief Judge

December 30, 1968

Pertinent Provisions of New York Statute of Frauds

Consolidated Laws of the State of N. Y. 1909, Ch. 52, § 242; N. Y. Real Property Law § 242 (McKinney)*.

§242. When Written Conveyance Necessary. An estate or interest in real property, other than a lease for a term not exceeding one year, or any trust or power, over or concerning real property, or in any manner relating thereto, can not be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the person creating, granting, assigning, surrendering or declaring the same, or by his lawful agent, thereunto authorized by writing. But this section does not affect the power of a testator in the disposition of his real property by will; nor prevent any trust from arising or being extinguished by implication or operation of law, nor any declaration of trust from being proved by a writing subscribed by the person declaring the same.

Laws of New York, 1944, Ch. 198, N. Y. Real Property Law § 259 (McKinney)*.

§ 259. When Contracts to Lease or Sell Void. A contract for the leasing for a longer period than one year, or for the sale, of any real property, or an interest therein, is void, unless the contract, or some note or memorandum thereof, expressing the consideration, is in writing, subscribed by the party to be charged, or by his lawful agent thereunto authorized by writing.

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* These sections are now respectively Laws of New York 1963, Ch. 576, § 5-703; N. Y. General Obligations Law, § 5-703 (McKinney).

Consolidated Laws of the State of N. Y. 1909, Ch. 45, § 31, N. Y. Personal Property Law, § 31 (McKinney)*.

§ 31. AGREEMENTS REQUIRED TO BE IN WRITING. Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking;

1. By its terms is not to be performed within one year from the making thereof or the performance of which is not to be completed before the end of a lifetime;

2. Is a special promise to answer for the debt, default or miscarriage of another person.

Laws of New York 1960, Ch. 287, § 85 and 85-a, N. Y. Personal Property Law, § 85 and 85-a (McKinney Supp. 1961)*.

§ 85. STATUTE OF FRAUDS GOVERNING CONTRACTS TO SELL GOODS AND SALES OF GOODS. 1. A contract to sell or a sale of any goods of the value of five hundred dollars or upward, except where the goods are to be manufactured especially for the buyer and are not suitable for sale to others in the ordinary course of the seller's business, shall not be enforceable by action unless:

(a) There is some note or memorandum in writing signed by the party to be charged or his agent in that behalf, sufficient to indicate that a contract to sell or a sale has been made between the parties and showing the quantity of goods sold or contracted to be sold, or

(b) The buyer has accepted part of the goods and actually received the same, or

(c) The buyer has given something in part payment.

2. A writing which otherwise satisfies paragraph (a) of subdivision one is not sufficient because it omits or incorrectly states a term agreed upon, but the contract is not enforceable under that paragraph beyond the quantity of goods shown in such writing.

§ 85-a. Statute of Frauds Governing Contracts to Sell Choses in Action and Sales of Choses in Action. A contract to sell or a sale of any choses in action of the value of fifty dollars or upward shall not be enforceable by action unless the buyer shall accept part of the choses in action so contracted to be sold or sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf.

---

* These sections are now Laws of New York 1963, Ch. 576, § 5-70; N. Y. General Obligations Law (McKinney); Laws of New York 1962, Ch. 553, § 1-206, § 2-201 and § 8-319; N. Y. Uniform Commercial Code, § 1-206, § 2-201 and § 8-319 (McKinney).

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighth day of November one thousand nine hundred and sixty-eight.

PRESENT: HON. J. EDWARD LUMBARD, Chief Judge,
HON. IRVING R. KAUFMAN,
HON. PAUL R. HAYS, Circuit Judges.

T. C. V'SOSKE, S. T. V'SOSKE, K. A. V'SOSKE, GEORGE A. SPATER and V'SOSKE SHOPS, INC.,
Plaintiffs-Appellants,

v.

E. T. BARWICK and E. T. BARWICK MILLS, INC.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed and that the action be and it hereby is remanded to said District Court for further proceedings in accordance with the opinion of this court with costs to be taxed against the appellees.

A. DANIEL FUSARO
Clerk

A true copy,

A. DANIEL FUSARO
Clerk

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IN THE

Supreme Court of the United States

October Term, 1968

No. 1046

E. T. BARWICK and E. T. BARWICK MILLS, INC.,

Petitioners,

—against—

T. C. V'SOSKE, S. T. V'SOSKE, K. A. V'SOSKE, GEORGE A. SPATER and V'SOSKE SHOPS, INC.,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION

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February 27, 1969

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Rule 52(a) of the Federal Rules of Civil Procedure 11

IN THE

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E. T. BARWICK and E. T. BARWICK MILLS, INC.,

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T. C. V'SOSKE, S. T. V'SOSKE, K. A. V'SOSKE, GEORGE A. SPATER and V'SOSKE SHOPS, INC.,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION

Statement

Respondents T. C. V'Soske, S. T. V'Soske, K. A. V'Soske, George A. Spater and V'Soske Shops, Inc. ("the V'Soskes") brought suit against petitioners, E. T. Barwick and E. T. Barwick Mills, Inc. ("Barwick") in the Supreme Court, New York County on June 22, 1964 claiming damages in amount of $775,000 by reason of the breach by Barwick of a written contract in which Barwick had agreed to purchase the assets and good will of V'Soske Shops, Inc. for a sum equal to its audited net worth plus $700,000 (4a-8a).*

Following removal to the United States Court for the Southern District of New York by reason of diversity of citizenship, the case was tried before Judge Lloyd F. MacMahon, without a jury, on April 15-17, 1968.

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* References are to pages in the joint appendix. All italics are added unless otherwise noted.

The Parties

Respondents, T. C. V'Soske, S. T. V'Soske, K. A. V'Soske and George A. Spater are all of the individual stockholders of V'Soske Shops, Inc., a small Puerto Rican corporation engaged in the manufacture of high quality custom-made rugs (4a, 83a-84a, 180a).

Petitioner E. T. Barwick is president and majority stockholder of E. T. Barwick Mills, Inc. (5a, 9a).

E. T. Barwick Mills, Inc. is a Georgia corporation (4a, 9a). It is the world's largest manufacturer of tufted carpets with annual sales in excess of $90,000,000 (275a). Prior to 1964 Barwick Mills was not in the custom-made rug market (Ex. P-1; 21a).

The Preliminary Negotiations

In June of 1963 Mr. E. T. Barwick became interested in the possibility of entering the custom-made rug market by acquiring the business of V'Soske Shops, Inc. and its subsidiaries. He visited with the V'Soskes in Puerto Rico on June 26-27, 1963 and inspected their plant at Vega Baja (59a). At this initial meeting Mr. Barwick outlined his desire to enter the custom carpet field and to acquire the business of V'Soske Shops, Inc. (14a, 59a-60a, 169a-170a).

At Thad V'Soske's suggestion Mr. Barwick subsequently met in New York with Mr. George A. Spater on August 15, 1963 (60a, 169a). Mr. Spater, then Executive Vice President and General Counsel of American Airlines, Inc., was one of the V'Soskes' oldest friends and had frequently acted as their attorney and adviser (34a-35a).

Mr. Barwick and Mr. Spater discussed the proposed acquisition at some length. Mr. Barwick made plain his

desire to purchase V'Soske's entire business, including that of its Irish subsidiary, V'Soske Joyce, Ltd., as well as his desire to enter employment contracts with the V'Soskes (Ex. P-1; 36a-37a, 170a).

On September 3, 1963 Mr. Barwick paid a second visit to the V'Soskes in Puerto Rico (170a). Again he emphasized his wish to buy the business and retain the services of the V'Soskes under a five year employment contract (Ex. P-9; 14a). When Thad V'Soske asked $4,000,000 for the business, Barwick countered with an oral offer of $1,500,000 (60a-61a, 170a-171a). The visit concluded with Mr. Barwick stating that he would think the matter over and would write Mr. V'Soske further on his return to Atlanta (61a, 171a).

On September 9, 1963 Mr. Barwick wrote Mr. V'Soske:

> "Referring to our conversation, I have been thinking over and discussing with our organization the transaction under discussion, and I am prepared to offer you $1,600,000 for the V'Soske Shops, Inc., subject of course to independent audits concerning the $1,000,000 net worth of the manufacturing entity.
>
> "I should like to suggest that if the transaction is acceptable to you, the initial payment of $1,000,000 for the company and the remaining $600,000 over the next four years in equal payments.
>
> "All phases of operations and management would be along the lines of our conversation.
>
> "After you have had time to consider this proposal, I shall be very glad to hear from you" (Ex. P-9; 14a).

Thad V'Soske replied on September 26, 1963, suggesting that the matter be given further consideration (Ex. P-10; 16a-17a).

Mr. Barwick's Offer of October 10, 1963

On October 10, 1963 Mr. Barwick wrote Thad V'Soske concluding:

> "I am willing, at this time, to increase my offer for a cash settlement for the audited book value of your company plus $700,000 to be paid in five equal annual installments of $140,000 each, with management contracts or arrangements as we discussed on our two visits.
>
> "I think this is as far as I am willing to go, and I should like to know within thirty days *whether or not this offer will be accepted* because I do not feel I can wait much longer before entering into this type of manufacture, perhaps in closer proximity to my plants in North Georgia.
>
> "I appreciate your letter very much and I hope to hear from you shortly" (Ex. P-2; 18a-21a).

The Extension of the Offer of October 10, 1963

On October 28, 1963 Thad V'Soske wrote Mr. Barwick requesting that his offer be extended for another thirty days (Ex. P-11; 22a). On November 1, 1963 Mr. Barwick granted the requested extension, stating "Please let me know as soon as possible your decision" (Ex. P-12; 23a, 185a).

The Formation of the Agreement

On November 29, 1963 Thad V'Soske wrote Mr. Barwick stating:

> "We have reviewed your offer carefully and have come to the conclusion that we are willing to sell our

business at the price you propose—its audited net worth plus $700,000—on the following terms:

"1. $1,200,000 down, payable within 30 days after an agreement is reached; the balance to be paid in equal monthly installments over a period of four years.

"2. Employment contracts will be signed with our five top management people for five years at present rates of compensation (aggregating $74,500.00 annually) for jobs having responsibility equal to their present jobs and at their present location in Puerto Rico, as per verbal agreement.

"3. Any brokerage or finder's fees, whether to Mr. Fred Thaheld or anyone else to whom you may have talked, be paid by you.

"4. The scope of the audit to be as outlined below" (Ex. P-3; 24a-27a).

Mr. V'Soske carefully outlined how "audited net worth", which was the cornerstone of the agreement set forth in the first paragraph of his letter, was to be determined. (Audited net worth is, of course, the equivalent of "audited book value" which had similarly been the cornerstone of Mr. Barwick's offer of October 10, 1963.) Audited net worth was to be determined by an independent audit to be made by a nationally recognized firm of certified public accountants comparable to Haskins & Sells. In making that determination three items were to be treated differently from what might otherwise have been done. Wool was to be recorded at V'Soske's cost without freight. Fixed assets were to be recorded at cost (less depreciation) with the exception of the Hummingbird machines which were to be taken as recorded on V'Soske's books at $3,100 each, installed, with frames, for an aggregate of approxi-

mately $238,700.* Advances to V'Soske's Irish affiliate totaling $93,000 were to be "accepted as made" (Ex. P-3; 24a-27a).

Mr. V'Soske concluded by inviting any examination Mr. Barwick might wish to make as to the correctness of his representations or any discussions Mr. Barwick might wish to have with Haskins & Sells about V'Soske's books and the financial statements which they had certified.

On December 2, 1963 Mr. Barwick wrote Mr. V'Soske stating:

> "I agree in principle with your outline of evaluation and I see no obstacle in our agreeing inasmuch as I have a high regard for Haskins & Sells inasmuch as they audit our spinning plants. Our overall public accountant is Arthur Anderson whom I am sure you have respect for also and I am sure Arthur Anderson and Haskins & Sells will have no difficulty in reconciling the account" (Ex. P-13; 28a-29a).

He then requested clarification as to the price at which the Hummingbird machines had been recorded, verification that the Irish affiliate property was included in the overall purchase price and the name of the fifth member of the top management group.

After receiving the requested information Mr. Barwick stated he was in accord with the agreement, writing on December 6, 1963:

> "Dear Thad:
>
> "This will acknowledge with thanks your letter of December 4th.

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* The Hummingbird machines had, in fact, been appraised by Chas. T. Main Company of Boston, Mass. at over $15,200 each.

"As stated in my recent letter I am in accord with your outline for purchase.

"I should like, if it is convenient with you, to visit you on the 19th and 20th of December with Mr. Mel E. Kellar, our Vice President and Treasurer to begin procedures for consummating the purchase.

"Please advise me if this time of visit is satisfactory with you" (Ex. P-15; 32a).

By this exchange of correspondence, an agreement had been made for the purchase of V'Soske Shops, Inc. at its audited net worth plus $700,000 and on the other conditions outlined. All that was needed to consummate the agreement was to determine audited net worth in the manner set forth in the letter of November 29, 1963.

The Confirmation of the Agreement

To begin procedures for consummating the purchase Mr. Barwick again visited with Mr. V'Soske in Puerto Rico on December 19 and 20, 1963. On this occasion he was accompanied by his treasurer, Mr. Mel E. Kellar, his attorney, Mr. Furman Smith, and a Mr. B. A. Talley who was to move to Puerto Rico to run the financial end of the V'Soske business for Mr. Barwick (87a, 172a).

The Barwick group visited the Haskins & Sells office in San Juan. There they examined the records of the audits of V'Soske Shops and the various income tax returns filed by V'Soske Shops (200a, 239a, 257a, 278a). Once again Mr. Barwick toured the V'Soske plant in Vega Baja where requested books and records were made available for inspection. This visit concluded with the understanding that the independent audit to determine audited net worth would commence immediately after the year end closing (Ex. P-28; 279a).

So far as the V'Soskes were advised, all that remained to be done was to determine "audited net worth" and consummate the purchase in accordance with the agreement of the parties. That this was likewise Barwick's understanding is evidenced by a letter written on December 26, 1963 by Barwick's treasurer addressed to Barwick's lenders in New York:

"Mr. Arthur Typermass
Investment Department
Metropolitan Life Insurance Company
1 Madison Avenue
New York, N.Y.

"Dear Art:

"We had a successful trip to Puerto Rico regarding the V'Soske Shops deal and the basis of an agreement which is the same as that outlined to you on my recent trip has been reached. The deal will be consummated on the receipt of the audit report about the middle or end of February.

"Kindest regards.

"Yours very truly,

"E. T. Barwick Mills, Inc.
"Mel Kellar
Vice Preside ' & Treasurer" (Ex. P-28; 279a).

The Procedures to Consummate the Purchase

In early January 1964 the independent audit to certify the net worth of the V'Soskes' business began. A physical inventory, in which Barwick's accountants and experts

participated, was completed to the satisfaction of all concerned (100a, 131a-132a).

At a meeting in San Juan on January 18, 1964 Barwick's representatives advised the V'Soskes that they wished to close the transaction by purchasing assets. This procedure was satisfactory to the V'Soskes and it was understood that the business would be run for Barwick's account from and after January 1, 1964 and that all transactions, other than in the ordinary course of business, would be cleared with Mr. Barwick (Ex. D-B; 242a). Mr. Barwick's attorney agreed to draft a formal agreement so as to effect a closing of the transaction on this basis immediately following the accountants' certification of audited net worth (54a, 217a).

At this meeting Mr. Barwick's attorney suggested that Mr. Barwick should have a right to cancel the V'Soskes' employment contracts at any time without cause upon payment of one half their salaries for the balance of the five year term (213a). The V'Soskes in response suggested that the price of such a cancellation right should be double the admittedly low salaries (41a, 213a, 219a, 249a).

Since Mr. Barwick was not present, Mr. Kellar, Barwick's treasurer, suggested that the matter be left up to Mr. Barwick, who would surprise the V'Soskes by his generosity. This suggestion was adopted and the meeting broke up early for a game of golf (41a, 214a).

The matter was resolved at a meeting of the two principals on the afternoon of March 2, 1964. Mr. Barwick agreed that the price for such a cancellation right would be the full salary called for by the agreement and that automobile expense and the expense of maintaining the guest cottage for business visitors at Mr. V'Soske's home would be included in Mr. V'Soske's reimbursable business

expenses. These details were set forth in the final draft of employment contract prepared by Barwick's attorneys on March 5, 1964 (Ex. P-26; 251a, 253a). The resolution was what would have been implied under the basic agreement even if not spelled out.

The parties also agreed on the final form of the formal contract which was prepared by Barwick's attorneys and transmitted to V'Soskes' attorneys on March 5, 1964 (Ex. D-C). None of the provisions of the formal agreement altered the terms set forth in the agreement arising out of the parties' correspondence.

Meanwhile the accountants had proceeded with the work of certifying the audited net worth of the business. By March 4, 1964 the parties were only about $13,000 apart on the final figure for such audited net worth (108a, 269a). The March 4 meeting concluded with the understanding that a final certification of audited net worth would be made and the formal closing of the transaction effected on March 24, 1964 (108a, 279a, 292a).

Barwick's Repudiation of March 9, 1964

On March 9, 1964 Mr. Barwick repudiated his agreement to purchase V'Soske's business. He wrote Thad V'Soske:

> "Dear Thad:
>
> "Since my return from Puerto Rico, I have reviewed the situation and have come to the conclusion that we should terminate negotiations looking toward the purchase of your business.
>
> "There are many reasons that led me to this conclusion. but I do not think any useful purpose would be served in detailing them" (Ex. P-20; 179a).

The Holdings of the Courts Below

The District Court held that the parties in their correspondence never reached an agreement, finding that it "was plain from the beginning that the parties did not intend to be bound until a written agreement had been signed and delivered". Consequently it ordered the action dismissed on the merits (329a-334a, 338a).

On November 8, 1968 the Court of Appeals, held that "By their correspondence, the parties entered into a valid contract, which Barwick breached by his letter of March 9, 1964" and specifically stated that it found "no evidence" substantiating the claim that the parties understood their correspondence to be of no legal effect or that V'Soske had reason to know that Barwick contemplated that no obligations should arise until a formal contract was executed (Petition A 8, A 10).* Since the trial court had not had an opportunity to consider the issue of damages, the case was remanded for that purpose.

A petition for rehearing was denied on December 2, 1968 and a suggestion for rehearing in banc was denied on December 30, 1968, "no active circuit judge having requested that a vote be taken on said suggestion" (Petition A 19).

Reasons for Denying the Writ

1. Petitioners' contention that a majority of the Court of Appeals failed properly to apply the "clearly erroneous" standard of Rule 52(a) of the Federal Rules of Civil Procedure is without foundation.

Petitioners claim that the "most important question in this case" is whether the parties intended to be bound

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* *V'Soske* v. *Barwick*, 404 F.2d 495, 499, 500.

before the execution of formal written documents and that this is "clearly an issue of fact" (Petition, p. 6). Even assuming this is an issue of fact, what petitioners' argument overlooks is that the Court of Appeals applied to this issue an even sterner test than that contemplated by Rule 52(a).* The majority could find *no evidence* to support a contention that Barwick contemplated that no obligation should arise until a formal contract was executed, saying, 404 F.2d at 499 (Petition A 8):

> "To overcome the reasonable inference we draw from the language of the correspondence that the parties did indeed intend thereby to create a binding contract, appellees must do more than merely point to the circumstance that a formal document was contemplated: they must show either that both parties understood that their correspondence was to be of no legal effect or that V'Soske had reason to know that Barwick contemplated that no obligations should arise until a formal contract was executed. *But appellees have referred to no evidence substantiating either of these possibilities, and we do not find them supported by our independent review of the evidence.*"

Foreclosing all argument on this score is the testimony of Mr. Barwick that he himself did not intend that a formal contract be executed before either party was bound in this transaction. Mr. Barwick's testimony on this subject is clear:

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* "A finding is 'clearly erroneous' when *although there is evidence to support it*, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed," *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1947). *A fortiori* a finding is "clearly erroneous" when there is no evidence to support it.

"'By Mr. Sullivan:

Q. Mr. Barwick, did you intend that formal contracts of purchase and sale be executed by both parties before either party was bound in this transaction?

A. No. I left this pretty much to Mr. Kellar and Mr. Smith'." (181a)

Yet petitioners produced no evidence that either Mr. Kellar or Mr. Smith intended that a formal contract should be executed before either party was bound.

The holding of the Court of Appeals that there was "no evidence" to support the findings of the District Court on this point, which petitioners themselves assert is the "most important question in this case", thus constitutes a holding that the finding of the District Court was clearly erroneous.

Finally, petitioners claim that the Court of Appeals arrogated to itself the question of passing on the credibility of certain testimony (Petition, pp. 8-9). The testimony dealt with the question of whether or not respondents' counsel had orally rescinded the contract on March 2, 1964. It is clear that the Court of Appeals did not overrule the District Court on this since the District Court had ruled that the testimony did not prove a rescission.*

The decision of the Court of Appeals was correct. Not a single active circuit judge voted for a rehearing in banc as requested by petitioners (Petition A 19).

2. The suggestion that the majority of the Court of Appeals misapprehended applicable New York law is likewise invalid.

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* The District Court held, "I do not think there was a rescission" (Petition A 16).

The fact that Mr. Barwick subsequently sought to amend the agreement to include new terms and that the V'Soskes made counter-suggestions with respect to such new terms, does not defeat the original agreement. "Any other rule would always permit a party who has entered into a contract like this through letters and telegraphic messages to violate it whenever the understanding was that it should be reduced to another written form, by simply suggesting other and additional terms and conditions", *Sanders* v. *Pottlitzer Bros. Fruit Co.*, 144 N.Y. 209, 214, 39 N.E. 75, 76 (1894). See also, *Rubinstein* v. *Rubinstein*, 23 N.Y.2d 293, 296, —— N.E.2d —— (1968) where specific enforcement of an agreement contemplating an accountant's certificate and a valuation of realty was ordered despite subsequent disputes "as to how various details of the transaction should be worked out."

The claim that the holding of the Court of Appeals implicitly disregarded decisions under New York law as to what is required to satisfy the Statute of Frauds is also without foundation. Contrary to petitioners' contention (Petition pp. 13-14) there is no doubt here as to who the sellers were. Mr. Barwick knew that the V'Soske brothers were the owners and sellers of their business and that Thad V'Soske in writing "*We* have reviewed your offer carefully and have come to the conclusion that we are willing to sell *our* business" (Ex. P-3; 24a), was acting as spokesman for the individual respondents (Ex. P-27; 75a). Where, as here, both parties have signed the correspondence constituting the agreement, the requirements of the Statute of Frauds are satisfied. *Interstate United Corporation* v. *White*, 388 F.2d 5 (10th Cir., Nov. 22, 1967, rehearing denied Feb. 12, 1968); *Crabtree* v. *Elizabeth Arden Sales Corporation*, 305 N.Y. 48, 110 N.E.2d 551 (1958). "The memorandum exacted by the statute does not have to be in one docu-

ment. It may be pieced together out of separate writings, connected with one another either expressly or by the internal evidence of subject matter and occasion." *Marks* v. *Cowdin*, 226 N.Y. 138, 145, 123 N.E. 139, 141 (1919).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

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Of Counsel

February 27, 1969

SUPREME COURT, U. S.

Office Supreme Court, U.S.
FILED
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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1968

No. 1046

E. T. BARWICK and E. T. BARWICK MILLS, INC.,
Petitioners,

against

T. C. V'SOSKE, S. T. V'SOSKE, K. A. V'SOSKE,
GEORGE A. SPATER and V'SOSKE SHOPS, INC.,
Respondents.

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

As to the Failure to Apply Rule 52(a)

Respondents do not dispute that the crucial issue in this case as it came before the Court of Appeals was one of fact, not of law. Nor do respondents deny that the Court failed to apply Rule 52(a) in resolving that issue. They say, however, that the Court applied "an even sterner test than that contemplated by Rule 52(a)". (p. 12)*

Respondents' argument rests on the premise that, since the Court of Appeals found "no evidence" to overcome

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* All page references are to the Brief for Respondents in opposition, unless otherwise noted.

what it felt was "the reasonable inference" from the correspondence that the parties did intend to be bound in the absence of a formal contract, this "constitutes a holding that the finding of the District Court [that they did not so intend] was clearly erroneous". (pp. 12, 13)

Respondent's argument is completely question-begging. It assumes from the Court's holding that it applied the proper standard of review, whereas it was the Court's failure to apply Rule 52(a) that enabled the Court to hold as it did.

If Rule 52(a) had been applied—rather than the different standard suggested by respondents—the findings of the District Court would have been presumptively binding on appeal and the burden would have been on respondents, who were attacking the findings, to show they were "clearly erroneous". Nothing can be clearer than that the findings by the District Court were not so treated.

Contrary to the Rule, the Court of Appeals made its own "independent review of the evidence", drew its own inferences from correspondence which was—at the least—susceptible to different interpretations, and required petitioners to "overcome" these inferences. (A 8)* By this device the Court shifted to petitioners the burden of showing that the "correspondence was to be of no legal effect" when the District Court had found that the evidence was "abundantly clear", "overwhelming" and "plain" that the parties did not intend to be bound by such correspondence. (A 8*, A 14)

In support of their argument that petitioner Barwick did not intend that a formal contract be executed before the parties were bound, respondents lift one question out of the entire record, wholly out of context. (p. 13) It is clear

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* *V'Soske* v. *Barwick*, 404 F. 2d 495, 499.

that what Mr. Barwick was saying was that he had left to his vice president, Mr. Kellar, and his counsel, Mr. Smith the question of the details as to how and when the parties would be bound. As the District Court put it, he "had delegated to them the authority and task of negotiating and formulating the final terms of a written contract." (A 14) And these two men testified unequivocally that there never was a contract. This testimony was so critical, that the Court directed the following questions to Mr. Kellar:

> "The Court: What did you say, what was said when Mr. Warner said 'You must understand we haven't got a deal here until'—I forget what he said. What did he say?
>
> "The Witness: He said, 'You must understand there is no contract, that there can be no contract until the liquidation—after the liquidation of the corporation, and if an occasion arises in the future you must be prepared to swear to this.'
>
> "[412] The Court: What did you say? What was said on your side of the subject? Who said it and what was said?
>
> "The Witness: Well, Mr. Smith and I acquiesced because *we didn't feel we had any contract at all.*
>
> "The Court: What did you say?
>
> "The Witness: I wouldn't remember.
>
> "The Court: Did you say okay?
>
> "The Witness: Yes. We agreed to it, yes sir." (JA 270a-271a) (Italics supplied)*

Respondents' attempt to argue that the Court of Appeals did not pass on the credibility of testimony in violation of Rule 52(a) ignores the indisputable fact that the Dis-

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* Mr. Smith similarly testified "I did definitely agree with you (referring to Mr. Warner) that there was no binding agreement and that I was prepared to so testify if it ever became material in any tax controversy." (JA 238a).

trict Court believed and accepted Mr. Kellar and Mr. Smith's testimony (p. 3, *supra*)—not as evidence of rescission—but as further evidence that both parties understood there was to be no binding agreement until the execution of a formal writing. The District Court said:

> "Rather, I think the testimony on that subject points *once again* to the fact that . . . *the parties* did not intend to be bound until execution and delivery of a formal contract". (A 16) (Italics supplied)

As to the Failure to Apply New York Law Concerning Subsequent Negotiations

Respondents do not dispute *Boysen* v. *Van Dorn Iron Works Co.*, 94 App. Div. 95 (4th Dep't N. Y. 1904) and other authorities holding that subsequent negotiations by both parties defeat any preliminary understanding. Instead they attempt to bring this case within *Sanders* v. *Pottlitzer Bros. Fruit Co.*, 144 N. Y. 209 (1894), where only the party disclaiming the contract sought to add new terms. They argue it was petitioner Barwick who "subsequently sought to amend the agreement to include new terms and that the V'Soskes made counter-suggestions with respect to such new terms . . ." (p. 14)

Even if the New York cases permitted such a nice distinction as the one respondents would draw between "new terms" and "counter-suggestions"—and they do not—the evidence is clear that it was respondent's counsel, Mr. Warner, who in telephone conversations subsequent to the correspondence,* first demanded a mortgage or other security for the deferred balance of the purchase price and a $30,000 unaccounted for expense account for Mr. V'Soske. (JA 217a-218a) It was Mr. V'Soske's insistence on this latter point, which was never settled, that caused negotiations to falter. (JA 78a, 251a) These demands, to mention

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* These telephone conversations are conveniently omitted from respondents' statement of facts.

two examples, were not, to borrow respondents' lexicon, "counter-suggestions" to any proposal of petitioner Barwick.

The fact that both parties sought to amend the understanding to include new terms distinguishes the instant case from *Saunders* v. *Pottlitzer, supra,* for the reasons stated in *Boysen* v. *Van Dorn Iron Works* (94 App. Div. at 99):

> "* * * The distinction is that both parties in this action sought to modify materially the original understanding, and each in effect recognized the right to make alterations in its terms before it became a consummated agreement."

As to the Failure to Apply New York Law Concerning the Statute of Frauds

Respondents argue that the requirement of the Statute of Frauds that the parties be identified is met because, they say, the words "we" and "our" in Mr. V'Soske's letter of November 29, 1963—which he signed as President on behalf of the corporation—were meant to refer to the individual respondents who were the stockholders. Of course, these are nothing more than the words normally used in business correspondence when referring to a corporation. The corporation is clearly meant, for instance, when the letter refers to "our Irish affiliate", "our inventories", "our books" and finally "if you want to buy us". (Ex. P-3; 25a-26a)

No one would dispute respondents' contention that the requirement of identifying the parties is satisfied when both parties sign the correspondence. The plain fact is, however, that the stockholders, who claim to be the contracting parties, never signed the correspondence in this case and there was no proof or even allegation at the trial that Mr. V'Soske "was acting as spokesman for the individual respondents" or had authority to sign for them. (14)

The contract which the individual respondents sued on was simply not the contract which the Court of Appeals found from the correspondence nor is such contract contained in any writing signed by the individual respondents.

CONCLUSION

We, therefore, respectfully request that the petition for writ of certiorari be granted.

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